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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Definition of an	)	**RM 9335**
Over-the-Air Signal of	)	
Grade B Intensity for Purposes	)	
of the Satellite Home Viewer Act	)	
	)	
To: The Commission	)	

REPLY COMMENTS OF THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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SUMMARY

On July 8, 1998, the National Rural Telecommunications Cooperative ("NRTC") filed an Emergency Petition for Rulemaking to Define an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act ("Emergency Petition") to prevent the massive disenfranchisement of millions of households resulting from an interpretation of the Satellite Home Viewer Act ("SHVA") by a Florida District Court. The Florida District Court's Preliminary Injunction was issued two days after NRTC filed its Emergency Petition. Effective October 8, 1998, it denies satellite retransmission of network programming to "unserved households" simply because they are predicted to receive a Grade B signal by the over-inclusive Longley-Rice model. By definition, under Longley-Rice, huge numbers of households -- one million or more -- will be banned from receiving satellite service across the country even though they cannot in fact receive a Grade B signal over-the-air.

As recognized be several members of Congress, the FCC Chairman, and the satellite industry, the termination of distant network signals to these households will be devastating to the growth of competition in the Multichannel Video Programming Distribution ("MVPD") market. For example, the Honorable John McCain, Chairman of the Senate Committee on Commerce, Science and Transportation and the Honorable Tom Bliley, Chairman of the House Committee on Commerce, expressed their concern over the impact of the Preliminary Injunction and requested that FCC Chairman William E. Kennard provide a preliminary estimate of the impact of the Preliminary Injunction on consumers and MVPD competition. Chairman Kennard

responded that the fallout of the injunction is "an impending 'train wreck' that need not occur." Chairman Kennard indicated that the Commission could conclude by February 1, 1999, an expedited rulemaking proceeding establishing ways to improve implementation of the SHVA for those consumers who are unable to receive an adequate local over-the-air signal. He feels that the court "can and should" delay the October 8th compliance date until the FCC's expected rulemaking proceeding is completed. We agree.

Meanwhile, in stark contrast to the views expressed by members of Congress, Chairman Kennard, satellite carriers and distributors, and consumers, the Broadcasters do not recognize the inequity resulting from the Florida District Court's Preliminary Injunction. They continue to blame satellite carriers and consumers for knowingly violating the "unserved household" restrictions of the SHVA, and argue in this proceeding that the Commission is without authority to define "an-over-the air signal of Grade B intensity" for purposes of the SHVA. They argue that no consumers will be disenfranchised from receiving network signals on October 8.

Late last week, however, on September 18, 1998, representatives of the broadcasting and satellite industries reached agreement on a set of principles designed to ensure that implementation of the Preliminary Injunction issued by the Florida District Court will be delayed until February 28, 1999. Under the agreement, the parties in the Florida litigation will jointly file -- and ask the court to sign -- a stipulation regarding consumers' options for receipt of local network signals, notice requirements for termination of satellite network service, and the provision of satellite subscriber data to broadcasters so that broadcasters may consider granting

waivers for receipt of distant network signals by satellite on a more broadscale basis. Additionally, last week, Senate Commerce Committee Chairman McCain and Senate Judiciary Committee Chairman Hatch proposed legislation to address this problem and extend the compliance date to February 28, 1999, the same date as the industry agreement. The bills look to the FCC to conclude an expedited rulemaking proceeding regarding "unserved households" by that date.

In light of the recent industry agreement and the pending legislation, it is critical that the FCC move quickly -- as promised by Chairman Kennard -- and adopt a new FCC definition of "an over-the-air signal of [G]rade B intensity" which more accurately reflects which households actually can receive an acceptable over-the-air signal and which may lawfully receive distant network signals by satellite.

NRTC recommends that the Commission define "an over-the-air signal of Grade B intensity" as the level of coverage provided within a geographic area in which 100% of the population, using readily available and affordable equipment, receives over-the-air coverage by network affiliates 100% of the time. Alternatively, the Commission could consider a 35 mile zone, which mirrors the network nonduplication rules for cable and also reflects the scope of exclusivity contained in typical Network Affiliation Agreements. Whatever definition is adopted by the Commission should be measurable and understandable. It should serve consumers, promote competition between satellite and cable, and maximize choice in the selection of video programming providers.

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The National Rural Telecommunications Cooperative ("NRTC"), by its attorneys and pursuant to section 1.405 (b) of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), hereby replies to the Comments submitted in response to NRTC's Emergency Petition for Rulemaking ("Emergency Petition"), filed in this proceeding on July 8, 1998.[1] In its Emergency Petition, NRTC urged the Commission to address the crisis facing the direct-to-home satellite industry -- the imminent, court-ordered termination of service to more than one million subscribers -- by establishing a consumer-friendly, understandable and fair definition of "an over-the air signal of Grade B intensity" for purposes of applying the

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[1] See, Public Notice, Report No. 2290, August 5, 1998.

"unserved household" restriction of the Satellite Home Viewer Act ("SHVA"), 17 U.S.C. §119.[2] In light of new proposed legislation on this issue and a recent agreement between the satellite and broadcasting industries to postpone the court's cut-off date for the receipt of distant network signals, the Commission should move forward quickly to conduct the requested rulemaking.

BACKGROUND

1. At the time NRTC filed its Emergency Petition, more than one million satellite subscribers stood to be disenfranchised from receiving distant network signals by satellite as a result of a Preliminary Injunction expected from a District Court in Florida interpreting the "unserved household" provisions of the SHVA.[3] NRTC urged the Commission to conduct a rulemaking proceeding on an expedited basis to establish a consumer-friendly, realistic definition

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[2] (10) Unserved Household. The term "unserved household", with respect to a particular television network, means a household that, among other things:

> (A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network, and

17. U.S.C. §119(d)(10)(emphasis added).

[3] CBS, Inc., et al. v. PrimeTime 24 Joint Venture, Order Affirming in Part and Reversing in Part Magistrate Judge Johnson's Report and Recommendation, Civil Action No. 96-3650-NESBITT (S.D. Fla. May 13, 1998).

of "an over-the-air signal of grade B intensity" for purposes of applying the "unserved household" restrictions of the SHVA.

2. Two days after NRTC filed its Emergency Petition, the Florida District Court issued its Preliminary Injunction.[4] Effective October 8, 1998, the court prohibited PrimeTime 24, the satellite carrier, from providing CBS and Fox network programming to any customer within an area shown on Longley-Rice propagation maps as receiving a signal of at least Grade B intensity from a CBS or Fox primary network station.[5] *By definition, under Longley-Rice, huge numbers of households will be banned from receiving distant network signals by satellite, even though they cannot in fact receive an over-the-air signal of Grade B intensity from the local affiliates.*

3. The projected impact of the Florida District Court's Preliminary Injunction weighed heavily not just on NRTC and the direct-to-home satellite industry, but on a wide range of Congressmen. In addition to a letter from 22 members of the House,[6] the Honorable John McCain, Chairman of the Senate Committee on Commerce, Science, and Transportation, and the Honorable Tom Bliley, Chairman of the House Committee on Commerce, wrote to William E.

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[4] CBS, Inc., et al., Supplemental Order Granting Plaintiff's Motion for Preliminary Injunction, Civil Action No. 96-3650-NESBITT (S.D. Fla. July 10, 1998).

[5] Id. at p. 2-3.

[6] See Letter of Congressman Rick Boucher et al. to FCC Chairman Kennard dated August 7, 1998. ("Boucher Letter"). A copy of the letter is attached hereto as Attachment A.

Kennard, Chairman of the Commission, on August 19, 1998, and expressed their concerns regarding the Preliminary Injunction and its impact on consumers and competition in the market for multichannel video programming distribution ("MVPD").[7]

4. In his response to Chairman McCain and Chairman Bliley, FCC Chairman Kennard expressed the view that "this is an impending 'train wreck' that need not occur."[8] He noted that the court's action may disrupt satellite service to subscribers who cannot receive an acceptable local network signal over-the-air, and that it may impede the continued development of competition in the MVPD market. He stated that the Florida District Court "can and should" postpone the effective date of the injunction, and that by February 1, 1999, the Commission could conclude an expedited rulemaking proceeding to address this problem.

5. The National Telecommunications and Information Administration ("NTIA"), in Comments supporting NRTC's Emergency Petition, provided sample data on the number of households that could be affected by adoption of either the Commission's current Grade B contour rules or the court-ordered Longley-Rice method -- and found the results to be

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[7] Joint Letter of Chairman John McCain and Chairman Tom Bliley to FCC Chairman Kennard dated August 19, 1998. ("McCain/Bliley Letter"). A copy of the letter is attached hereto as Attachment B.

[8] Response Letter of FCC Chairman Kennard to Chairmen McCain and Bliley dated September 4, 1998. ("Kennard Letter"). A copy of the letter is attached hereto as Attachment C.

"astounding."[9] Depending on which method NTIA employed to determine affected households in the sample, there are as many as *9 million households* (almost 10 percent of American television households) that would be rendered ineligible to receive satellite-delivered network programming.[10] NTIA noted that the definition of "an over-the-air signal of grade B intensity" will have a marked effect on the ability of DBS to compete for a significant number of households in the MVPD market.

6. In stark contrast to the views expressed by Chairman McCain, Chairman Bliley, Representative Boucher and his colleagues, Chairman Kennard, NTIA and many others in this proceeding, the National Association of Broadcasters ("NAB") and the Network Affiliated Stations Alliance ("NASA") (together, the "Broadcasters") claimed that the "impression" created by NRTC in its Emergency Petition that more than one million satellite consumers are in danger of imminent disenfranchisement as a result of the Preliminary Injunction is "pure bunk."[11] According to NASA, while the "notion" that satellite carriers cannot compete effectively with cable has become "politically fashionable" in Washington, it is not true.[12] They claim that there is no "emergency" and that -- even if there were -- the Commission is powerless to address it. NAB even went so far as to suggest that the Commission would be acting as nothing more than a

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9 See NTIA Comments at p. 3.

10 Id.

11 NAB Further Response at p. 3.

12 NASA Comments at p. 31.

mere "pawn" of the satellite industry if it were to address this problem in a rulemaking proceeding.[13]

7. Notwithstanding the fact the Broadcasters denied in this proceeding that an emergency situation was presented by the imminent disenfranchisement of one million or more satellite subscribers, the broadcasting and satellite industries on September 18, 1998 reached an agreement on a set of principles designed to ensure that the implementation of the Preliminary Injunction is delayed until February 28, 1999.

8. Additionally, last week, Senator McCain and Senator Hatch proposed legislation to address this problem and to extend the compliance date until February 28, 1999, the same date as the industry agreement. The bills look to the FCC to conclude an expedited rulemaking proceeding regarding "unserved households" by that date.[14]

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[13] NAB Preliminary Response at p. 8.

[14] S. 1720, 105th Cong., 2d Sess. (1998); S. 2494, 105th Cong., 2d Sess. (1998). See Satellite Compulsory License Reform Process and S. 1720 Chairman's Mark, 63 Cong. Rec. S10610 - S10611 (daily ed. Sept. 18, 1998); The Multichannel Video Competition Act of 1998, 63 Cong. Rec. S10524-S10525 (daily ed. Sept. 17, 1998).

I. With the exception of the Broadcasters, most Commenters agree that the Commission is faced with an "emergency:" more than one million consumers stand to be disenfranchised from receiving distant network signals by satellite as a result of the Florida District Court's Preliminary Injunction.

9. Although the industry agreement looks toward postponement of the October 8, 1998 effective date of the Florida Court's Preliminary Injunction until February 28, 1999, it is necessary to respond to the Broadcasters claim in this proceeding that there is no real "emergency" presented at this time because no consumers will be disenfranchised from receiving network signals as a result of the Preliminary Injunction.[15] They argue that *all* satellite subscribers that will be disconnected *can* in fact receive acceptable local signals over-the-air or from cable.[16]

10. The Preliminary Injunction is premised on the Longley-Rice model and is scheduled to become effective in less than three weeks unless extended to February 28 by the Florida Court as requested in the industry agreement. The court provided an exception to Longley-Rice only where (1) written consent is obtained for the CBS or Fox station affiliate or the relevant network, or (2) a signal intensity test is conducted, "according with the procedures outlined in the Declaration of Jules Cohen," at the consumer's home (15 business days after the affiliate station is given notice of intent to test) and the test proves that the household cannot

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[15] See, NAB Further Response at p. 3; NASA Comments at p. 35; Letter of Edward O. Fritts, President and CEO, National Association of Broadcasters, to members of Congress, dated August 6, 1998 at p. 2. ("Fritts Letter"). A copy of the letter is attached hereto as Attachment D.

[16] See Fritts Letter at p. 2; NASA Comments at p. 36.

receive a signals of grade B intensity.[17] The court's limited exceptions to the Longley-Rice model (i.e., waivers from the affiliates or signal measurement tests conducted at individual homes) are of no practical effect. Up to this point, the affiliates have shown no inclination to grant large numbers of waivers, and even if individual home testing were not prohibitively expensive, there has been no agreed-upon methodology for measurement.[18] We are hopeful that under the new industry agreement, the affiliates will be more inclined to grant waivers to consumers on a more broadscale basis.

11. Longley-Rice is grossly inappropriate for purposes of measuring Grade B signal intensity under the SHVA.[19] The Longley-Rice model has never been used by the Commission for measuring signal strength at individual households, nor has it been sanctioned by the Commission for the purpose of interpreting the SHVA. Like the Grade B contour itself, the Longley-Rice model is based on reception probabilities that are unacceptably low (50% of the locations, 50% of the time, with 50% confidence) -- far below the probabilities acceptable to

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[17] Jules Cohen is a consultant hired by the broadcasters.

[18] See DIRECTV Comments at pp. 5-6 *citing* U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals (rel. August 1, 1998), pp. 125-126.

[19] See NRTC Emergency Petition at pp. 8-9, 13-14; DIRECTV, Inc. ("DIRECTV") Comments at pp. 7-8; PrimeTime 24 Joint Venture ("PrimeTime 24") Comments at pp. 7, 9-13. See also, EchoStar Petition for Declaratory Ruling and Rulemaking With Respect to Defining, Predicting and Measuring "Grade B Intensity" For Purposes of the Satellite Home Viewer Act, RM No. 9345, Public Notice, DA 98-1710 (released Aug. 26, 1998). ("EchoStar Petition").

consumers of telephone, electric and other basic, modern services.[20] In using Longley-Rice for its injunction *the court effectively disenfranchises at least half of the households predicted to receive the signal*. By definition, under Longley-Rice, if the Florida Court's Preliminary Injunction remains in effect then one million or more satellite consumers will be cut-off from receiving network service by satellite *even though many of them will be unable to receive acceptable service over-the-air*.[21]

12. Many members of Congress and Representatives of the satellite industry share NRTC's concerns that the Preliminary Injunction will be disastrous for consumers and for competition:

- Representative Boucher and 22 other members of Congress referenced the grave effects that would flow from the "imminent disenfranchisement of more than a million satellite consumers" as a result of the pending injunction.
- Chairman McCain and Chairman Bliley noted that the pending injunction "threatens to undermine the progress Congress has made in promoting competition."
- Chairman Kennard referred to the "impending train wreck" and its attendant anticompetitive effect on an expected 700,000 to 1,000,000 subscribers.
- NTIA was "astounded" by its projected impact of the scope of the Preliminary Injunction, estimating that up to 9,000,000 households ultimately could be rendered ineligible to receive satellite-delivered network programming.

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20 See DIRECTV Comments at p. 18.

21 EchoStar Petition at p. 23.

- The Satellite Broadcasting & Communications Associations ("SBCA") found that "millions of customers" will be unable to receive network programming via satellite unless the Commission acts quickly on this issue.

- DIRECTV expressed concern that the situation had reached "crisis proportions" and "literally millions of satellite consumers" may be threatened with termination of their network service.

- The National Programming Service ("NPS") concluded that "more than one million total HSD consumers stand to lose access to network signals"

- EchoStar noted that the Florida District Court's Order threatens to leave "hundreds of thousands of consumers without *any* network service.[22]

13. As recognized by NRTC, Representative Boucher and his colleagues, Chairman McCain, Chairman Bliley, Chairman Kennard, NTIA, the SBCA, DIRECTV, NPS, EchoStar and others, there is absolutely no doubt that countless satellite consumers *who in fact do not receive a Grade B signal over-the-air* will be caught in the overprotective net of Longely-Rice.[23] The Broadcasters simply dismiss these concerns as "politically fashionable" and "pure bunk."[24] They remain unconcerned that as a result of the injunction huge numbers of consumers will be unable to receive local signals over-the-air, but will not be permitted to receive distant network signals by satellite.

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[22] Boucher Letter at p. 2; McCain/Bliley Letter at p. 1; Kennard Letter at pp. 1-2; NTIA Comments at p. 3; SBCA Comments at p. 4; DIRECTV Comments at pp. 3, 6; NPS Comments at p. 1; EchoStar Petition at p. 5.

[23] See NRTC Emergency Petition at p. 14; McCain Bliley Letter at p. 1; Kennard Letter at p. 1; NTIA Comments at p. 2; SBCA Comments at p. 3; DIRECTV Comments at p. 3; NPS Comments at p. 1; EchoStar Petition at pp. 11-14.

[24] See NAB Comments at p. 3. NASA Comments at p. 31.

14. Largely as a result of Congressional pressure, however, the broadcasters agreed last week to seek an extension until February 28, 1999 of the compliance date for the Preliminary Injunction.[25] However, even with the industry agreement leading to an extension of the effective date of the Preliminary Injunction -- which is critically important -- the underlying problem will only be delayed, not solved. A comprehensive FCC rulemaking is required. As NTIA's sampling demonstrates, some 9,000,000 households (almost 10% of American television households) ultimately could be rendered ineligible to receive distant network signals by satellite utilizing either Longley-Rice or Grade B contour, both of which are based on an unacceptable "50/50" standard. An expedited rulemaking proceeding is urgently required to establish a new definition of "an over-the-air signal of Grade B intensity" for purposes of the SHVA.[26]

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[25] On September 17, 1998, the NAB President wrote to Senate Majority Leader Lott and said broadcasters "sincerely hope you will agree [the industry agreement] is a substantial good-faith effort on the part of broadcasters in resolving what has become a political dilemma." See Communications Daily, Sept. 21, 1998 at p. 1.

[26] The original October 8 date, only 90 days from issuance of the Court Order, created nightmarish logistical problems for the satellite industry. Most subscribers are on 30 day billing cycles, and notice of termination of service must be provided at least 30 days in advance of the disconnections. Unless the Commission moves quickly to conclude its rulemaking proceeding will in advance of the February 28 cut-off date, the same type of administrative problems will exist at that time.

II. Contrary to the Broadcasters' arguments, the Commission is plainly authorized to define "an over-the-air signal of Grade B intensity" for purposes of the SHVA.

15. NRTC noted in its Emergency Petition that the SHVA referred to a signal of Grade B intensity "as defined by the Federal Communications Commission," yet the FCC has never defined that term for purposes of the SHVA. The Broadcasters argue, nevertheless, that the Commission is legally unable to act on NRTC's Emergency Petition, because Congress "froze" into the SHVA the Commission's definition of a "signal of Grade B intensity" existing in 1988, the year the SHVA was enacted.[27]

16. As NRTC pointed out in its Reply Comments filed in response to NAB's Preliminary Response, the cases cited by the NAB in opposition to the Commission's authority to conduct this rulemaking are all far off point. First, they deal with statutes interpreting the terms of other *statutes* (not an administrative rule), and second, the court applied the rule of law urged by NAB only when the statute was specifically referred to by *name and section number*. Neither of these circumstances is present with the Grade B language contained in the SHVA.[28]

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[27] NAB Preliminary Response at 21-22. See also NASA Comments at p. 21.

[28] See NRTC Reply to NAB at p. 9; Hassett v. Welch, 303 U.S. 303 (1938); Curtis Ambulance of Florida v. Board of County Commissioners of Shawnee County, 811 F.2d 1371, 1378 (10th Cir. 1987); Bexar County Criminal District Attorney's Office v. Mayo, 773 SW2d 642 (Tex. Ct. App. 1989); United States v. Rodriguez-Rodriguez, 863 F.2d 830, 831 (11th Cir. 1989); Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co., 217 F.Supp. 210, 214 (S.D. N.Y. 1963).

17. The U.S. Supreme Court in Lukhard v. Reed, 481 U.S.C. 368 (1987) made it clear that "it is not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place."[29] The Supreme Court in Helvering v. Wilshire Oil Co., 308 U.S. 90 (1939) held that an agency is free to change such a term, because otherwise an agency would be unable to change its rules prospectively even through the exercise of appropriate rulemaking powers, without the prior consent of Congress. NAB's and NASA's argument that the FCC's definition of Grade B as it stood in 1988 remains "frozen" in defining "unserved household" would deprive the Commission of the very qualities which the Supreme Court has recognized as "valuable" to the administrative process: ease of adjustment to change, flexibility in light of experience and swiftness in meeting new or emergency situations.[30]

18. NASA claims NRTC's reliance on Lukhard and Helvering is misplaced because in those cases, (1) the term in question was ambiguous and purposefully left undefined by Congress, (2) the ambiguous terms were redefined by the administrative agency selected by Congress to administer the statute containing the ambiguous terms and (3) the agency's interpretation of the ambiguous terms was consistent with Congressional intent. The term "an over-the-air signal of grade B intensity" in fact *is* ambiguous and open-ended in the SHVA, because Congress did *not* specifically incorporate a rule section into the SHVA's definition of

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29 NRTC Reply to NAB at p. 7, *citing* Lukhard v. Reed, 481 U.S. 368, 379 (1987).

30 Id. at p. 11.

"unserved household." Rather, Congress simply incorporated the term into the statute and recognized that the Commission had authority to define it.

19. In the SHVA, as in Lukhard and Helvering, Congress did *not* make a *specific* reference to another statute, rule section or regulation. Congress simply referred the FCC's general definition of a term ("an over-the-air signal of Grade B intensity"). In arguing that the signal strength standards in Section 73.683(a) have been codified for purposes of the SHVA and are not subject to revision by the Commission, NAB and NASA ignore a basic rule of statutory construction -- that a statute of *specific* reference refers to a particular statute by its title or section number while a *general* reference statute refers to the law on the subject generally.[31] In the case of *general* reference, the rules of statutory construction show that all subsequent amendments to the cited statute *are* incorporated into the referring statute.[32] As already noted in our Reply to NAB, in defining an "unserved household" in the SHVA Congress did *not* make a *specific* reference to a particular rule.

20. The language of 17 U.S.C. §119(d)(10), "an over-the-air signal of [G]rade B intensity (as defined by the Federal Communications Commission) . . .", is consistent with a

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[31] U.S. v. Rodriguez-Rodriguez, 863 F2d 830, 831 (11th Cir 1989), *citing*, 2A Sutherland Statutory Construction §51.07 at page 514 (4th ed. 1984).

[32] Rodriguez-Rodriguez at 831 [emphasis added] *citing* Hurwitz v. United States, 208 F.Supp. 594, 596-97 (S.D. Tex. 1962), *aff'd*, 320 F2d 911 (5th Cir. 1963), *cert. denied*, 376 U.S. 936, 84 S. Ct. 791, 11 L. Ed. 2d 658 (1964).

general reference to the laws on signal intensity measurements.[33] When a statute refers to the law on the subject generally, subsequent amendments to the law are incorporated into the statute. It follows that if the FCC created in its rules a new definition of an "over-the-air signal of [G]rade B intensity," this new definition would be incorporated indirectly into the SHVA's definition of "unserved household."

21. NASA continues by making the claim that, "an agency does not have authority to interpret a statute it is not responsible for administering . . . [and b]ecause the Commission is not authorized to administer the copyright laws, it is without authority to interpret the Copyright Act."[34] However, by explicitly naming the FCC within the SHVA -- and deferring to its definition of "an over-the-air signal of Grade B intensity" -- Congress clearly turned to the Commission as the expert regulatory agency in telecommunications matters to define a telecommunications term. The fact the term is located in the Copyright Act is of no significance as to whether the Commission is authorized to define it.

22. As noted by DIRECTV, the text of Section 119 is the "best evidence" of Congressional intent with respect to the definition of "Grade B intensity." Unlike certain of the Section 111 cable compulsory copyright license definitions, where Congress explicitly incorporated an existing FCC rule into the statute, Congress did not reference within the text of

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33 NRTC Reply to NAB at pp. 8-9.

34 NASA Comments at p. 25.

the "unserved household" definition any specific FCC regulations in effect at the time the legislation was enacted.[35] To the contrary, Congress simply referred to "Grade B intensity" as the FCC may define it. The FCC is free to -- and should -- define that term for purposes of the SHVA.

III. The Commission should define "an over-the-air signal of Grade B intensity" as the level of coverage provided within a geographic area in which 100% of the population, using readily available and affordable equipment, receives over-the-air coverage by network affiliates 100% of the time.

23. Both DIRECTV and EchoStar noted that the "unserved household" restriction cannot be enforced without the FCC establishing both a model predicting Grade B intensity and an appropriate measurement methodology designed specifically for the SHVA.[36] In its Emergency Petition, NRTC urged the Commission to adopt a Grade B intensity standard that would reflect "a geographic area in which 100% of the population, using readily available and affordable equipment, receives over-the-air coverage by network affiliates 100% of the time."[37] DIRECTV and EchoStar essentially reached the same conclusion as NRTC, arguing that a 99-99-99 model (i.e., one that predicts the outermost boundary at which 99% of households receive a

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35 DIRECTV Comments at pp. 13-14, note 38 citing to 17 U.S.C. §111(f).

36 See DIRECTV Comments at p. 16; EchoStar Petition at p. 6.

37 NRTC Emergency Petition at p. 16.

Grade B signal 99% of the time with 99% confidence) would be appropriate to utilize in the SHVA context.[38]

24. As pointed out by the Commenters in this proceeding, two different Federal District Courts have recently applied two different legal tests in construing the "unserved household" restrictions. The Florida District Court's Preliminary Injunction references Grade B signal intensity based on the Longley-Rice predictive model. As mentioned above, however, the Longley-Rice model, as with traditional Grade B contours, is based on extremely low and unrealistic probabilities: an acceptable over-the-air signal is received at only 50% of the locations, only 50% of the time, with only 50% confidence. The North Carolina District Court simply struck a 75 mile circle around the transmitter site and prohibited retransmission of distant network signals within that zone, even though the FCC's rules do not contemplate a 75 mile zone for any such purpose. Neither of these methodologies work.

25. Beyond the appropriate predictive model, as many Commenters pointed out, the Commission's existing Grade B measurement methodology itself expressly *excludes* its use as a technique for measuring signal strength at individual homes.[39] Rather, the Commission's signal

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[38] EchoStar Petition at p. 20-21. Although a difference of 1% may seem minor, "every percentage point under 100% represents households that will be disenfranchised . . ." Id. at p. 24. Based on 10,000,000 DBS subscribers, for instance, 1% represents 100,000 subscribers. NRTC recommends a "100/100" test because it supports universal access to television service -- just like electric, telephone and other basic, modern services.

[39] See NRTC Emergency Petition at pp. 7-9; DIRECTV Comments at p. 8; EchoStar (continued...)

strength measurement rules were designed for TV allocation purposes, as a predictive measurement of broadcast interference.[40] They assume a roof top antenna at thirty feet above ground (higher than many rooftops); they assume that the antenna has been oriented for maximum gain with respect to individual stations (not true in most households); they assume that no signal loss occurs between the antenna and the television set (it does); and they assume measurements at a 100 foot "mobile run" along the street (thereby minimizing the effect of trees, buildings and other obstructions at the individual household). Collectively, these limitations severely reduce the likelihood that viewers will actually receive an acceptable picture at their television set even though they may be predicted to receive one under the Longley-Rice model and therefore be deemed to receive a "signal of Grade B intensity."[41]

26. The SHVA's use of the term "Grade B intensity" must be defined by reference to a new, more accurate measure of signal reception as well as to a new, more accurate methodology that can be used to predict the geographic areas, or contours, that will receive this specified measure of intensity.[42] The "unserved household" restriction cannot be applied and enforced fairly without models specifically designed for the SHVA.

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39 (...continued)
Petition at p. 3; PrimeTime 24 Comments at p. 10.

40 47 C.F.R. §73.686

41 See EchoStar Petition at pp. 27-29.

42 DIRECTV Comments at p. 16.

27. In all circumstances, ordinary consumers must be ensured of receiving a good quality picture either over-the-air or by satellite. As NRTC pointed out in its Emergency Petition, by using a geographic area in which 100% of the population, using readily available and affordable equipment, receives over-the-air coverage by network affiliates 100% of the time, the Commission would ensure that the core service area of network affiliates is protected while authorizing satellite reception of distant network signals by all households which in fact are unable to receive an acceptable over-the-air picture. Another possibility is for the Commission to define unserved households as those households located outside a 35 mile radius from the local transmitter site, which would mirror the same zone as the "network nonduplication rules" for cable and also would reflect better the actual exclusivity obtained by affiliates from networks in their Network Affiliation Agreements.[43]

28. Whatever definition is adopted by the Commission should be readily measurable and understandable. It should serve consumers, promote competition between satellite and cable, and maximize choice in the selection of video programming providers.

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[43] Even though the SHVA is based on a "Grade B signal strength" test, affiliate nondouplication rules for cable extend only 35 miles, as do typical Network Affiliation Agreements. In the Matter of Revision of the Cable and Satellite Carrier Compulsory Licenses, Reply Comments of NRTC, filed June 20, 1997 with the Copyright Office, pp. 7-8; 47 C.F.R. §§ 76.93, 76.53, 73.658(m).

CONCLUSION

29. While the Broadcasters complain that satellite carriers have violated the SHVA, an "unserved household" definition which can be practically implemented and understood by satellite carriers, distributors, network affiliates and consumers alike, does not exist. The Florida District Court's Preliminary Injunction is far from an equitable solution as it would unfairly deny satellite transmission of network programming to one million or more households which in fact are unable to receive an acceptable Grade B signal over-the-air.

30. Congress, the FCC Chairman and the satellite industry recognize the devastating competitive impact the Florida District Court's Preliminary Injunction will have on the MVPD marketplace. Chairman Kennard in his response to Chairman McCain and Bliley characterized the fallout of the injunction as "an impending 'train wreck' that need not occur." He indicated that by February 1, 1999, the Commission could conclude an expedited rulemaking proceeding establishing ways to improve implementation of the SHVA for those consumers who are unable to receive an adequate local over-the-air signal. He feels that the court "can and should" delay the October 8th compliance date until the FCC's expected rulemaking proceeding is completed. We agree.

31. Congress indicated in the SHVA that "a signal of Grade B intensity" should be defined by the Federal Communications Commission. Congress' reference to the FCC indicates its clear intention to defer to the expert telecommunications agency in defining a